Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

FRANK H. FEICHKO, JR.,

Petitioner,

versus

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A DELAWARE CORPORATION, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY, A DELAWARE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did a plaintiff whose FELA action was wrongly removed from state court to federal court in violation of 28 U.S.C. Section 1445(a) waive his right to contest the federal court's wrongful assumption of subject matter jurisdiction where he never acquiesced to the removal, immediately moved for a remand to state court and then appealed the fact-based question which caused the district judge to refuse to remand the action to state court?

2. Is the court of appeals' determination that the plaintiff had waived his right to chal-lenge the wrongful removal of his FELA case consistent with the rules Congress prescribed to preserve a plaintiff's choice of forum for his FELA claims or with the decisions of this Court de-fining the limited power of the federal forum to decide wrongly removed FELA claims?

3. Is the adjudication of plaintiff's FELA claims in the face of his continuing challenge to the federal court's subject matter jurisdiction constitutionally void as beyond the federal courts' limited power under Article III to decide only those cases or controversies specifically allowed by Congress?

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OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit in *Frank H. Feichko, Jr. v. Denver & Rio Grande Western Railroad Company; The Southern Pacific Transportation Company*, dated July 19, 2000, denying the Petitioner's Request for *En Banc* Consideration/Rehearing, is set forth in the Appendix hereto (App. 31).

The opinion of the Court of Appeals for the Tenth Circuit in *Frank H. Feichko, Jr. v. Denver & Rio Grande Western Railroad Company; The Southern Pacific Transportation Company*, 213 F.3d 586(5/31/00), is set forth in the Appendix hereto (App. 1-17).

The unpublished Memorandum Decision and Order of the United States District Court for the District of Utah, Northern Division, in *Frank H. Feichko, Jr. v. Denver & Rio Grande Western Railroad Company; The Southern Pacific Transportation Company,* dated August 2, 1996, is set forth in the Appendix hereto (App. 18-30).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court was entered on May 31, 2000 (App. 1).

The order of the United States Court of Appeals for the Tenth Circuit refusing the Petitioner's request for *En Banc* Consideration/Rehearing of its decision affirming the District Court was entered on July 19,2000 (App.24). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

United States Code, Title 28, Section 1445(a):

> A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. [Sections] 51-54, 55-60), may not be removed to any district court of the United States.

United States Code, Title 45, Section 51:

> Every common carrier by railroad while engaging in [interstate] commerce..., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce....

United States Code, Title 45, Section 56:

> ...The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Federal Rule of Civil Procedure 12(h)(3):

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

STATEMENT OF THE CASE

On January 11, 1993, the Petitioner Frank H. Feichko, Jr. (hereinafter referred to "Feichko") was injured in Helper, Utah, when a four-unit locomotive consist collided with a parked locomotive he was occupying in the Helper train yard. Feichko was searching for person-al property he had left behind the day before while working as an engineer for the Respondent Denver & Rio Grande Western Railroad (hereinafter referred to as "D&RGW"). The consist which collided with the parked locomotive was operated by Southern Pacific Transportation Company (hereinafter referred to as "SP").

Feichko then brought a civil action on October 31, 1995, in the Seventh Judicial District Court in Carbon County, Utah, against both D&RGW and SP. Asserting that he was injured while in the course and scope of his employment as an engineer for the defendants, Feichko sought damages from each of them in three separate counts under the Federal Employer's Liability Act (FELA), 45 U.S.C. Sections 51 *et seq.*; the Boiler Inspection Act (BIA), then codified at 45 U.S.C. Sections 23 *et*

seq.; and for common law negligence under Utah law. A jury trial was demanded by Feichko on all of his claims.

The gist of Feichko's FELA claim was that D&RGW and SP had failed to provide him with a reasonably safe place to work, had failed to maintain reasonably safe and suitable equipment including the braking mechanism on their locomotives and had failed to take sufficient steps to assure the safe movement of railroad engines within the Helper yard. Feichko also alleged that the defendants had violated their duty under the BIA when they allowed the consist to operate with a braking system which was unsafe. Finally, he relied upon this statutory violation together with the defendants' alleged failure to warn him of the impending collision and their operation of the locomotive consist itself as evidence of the their negligence under Utah common law.

D&RGW and SP, both Delaware corporations, answered Feichko's complaint on December 1, 1996, and four days later, filed a notice of removal of Feichko's civil action to the United States District Court for the District of Utah Central Division pursuant to the provisions of 28 U.S.C. Section 1441(b). In their notice of removal, they alleged that this action was one in which the federal court had original jurisdiction under 28 U.S.C. Section 1332(a) and removal was proper because "the plaintiff and the defendants are citizens of different states and the matter in controversy exceeds $50,000, exclusive of interest and costs."

D&RGW and SP acknowledged that Feichko's first two claims under FELA and the BIA were not removable to federal court pursuant to 28 U.S.C. Section 1445(a). But they contended that as a matter of law, Feichko's FELA claim and the attendant BIA claim were not viable since

"there is no factual dispute that [Feichko] was

> not acting within the course of his employment at the time he alleges he was injured...and the mere pleading of these claims should not operate to prevent the removal of this action to [federal] court."

Once Feichko's civil action was removed to federal court, D&RGW and SP immediately moved for partial summary judgment in their favor on Feichko's FELA and BIA claims "because the facts are undisputable that plaintiff was not acting within the course of his employment when he alleges he was injured." Feichko responded by moving to remand the matter to state court arguing that the first and second claims as recited in his state court complaint, i.e., for relief under FELA and the BIA, are not removable under the prohibitory provisions of 28 U.S.C. Section 1445(a).

Moreover, he contended that under FELA the question of whether he was acting within the course and scope of his employment at the time of his injury "is a matter of fact to be determined by the jury [as] the trier of fact." He therefore sought an order remanding his civil action to the Seventh Judicial District Court in Carbon County, Utah.

These competing motions were fully briefed by the parties and then argued before the District Court, Greene, J., in April of 1996. On August 2, 1996, the District Judge issued a Memorandum Decision and Order dismissing Feichko's FELA and BIA claims against D&RGW and all of his claims against SP as a matter of law(App. 2;18-30). The motion judge determined from the materials before him *inter alia* that Feichko "was not acting within the scope of his employment pursuant to any duties or in furtherance of the railroad's interest when the injuries were sustained" and that his search for personal property in the locomotive possibly left there the day

before while on his shift as an engineer for D&RGW was unrelated to his employment and bore no causal relationship to his duties as an engineer for D&RGW (App. 22). All claims against SP were dismissed since no showing was made that Feichko was its employee at any material time.

Because the District Judge ruled that neither of Feichko's claims under FELA or the BIA presented a fact question which deserved to be heard by a jury, he determined that they could not remanded to the state court (App. 25). However, Feichko's common law negligence claim against D&RGW under state law "was properly removed to federal court and is not subject to remand" (App. 25). Accordingly, the defendants' motion for partial summary judgment was allowed and Feichko's motion to remand the case to state court was denied (App. 2; 25). A judgment of dismissal entered consistent therewith on September 10, 1996.

With D&RGW the only remaining defendant in the case and with only the common law negligence claim under state law left for resolution, extensive discovery ensued between the parties(App. 2). Eventually, both parties moved for summary judgment, Feichko asserting as a matter of law that D&RGW was negligent and that he was not contributorily negligent under state law; and D&RGW contending that the scope of its duty under state law did not encompass Feichko as he sought to retrieve his personal property in the locomotive.

On August 10, 1998, the District Court granted D&RGW's motion for complete summary judgment, denied as moot Feichko's summary judgment motion and dismissed his complaint in its entirety. *Frank H. Feichko, Jr. v. Denver & Rio Grande Western Railroad*, 13 F. Supp. 2d 1212(D. Utah 1998)(App. 2).

On appeal to the Court of Appeals for the Tenth Circuit, Feichko's Opening and Reply Briefs challenged, among other things, the District Court's 1996 ruling dismissing his claims under FELA and the BIA on the basis that triable fact question existed concerning whether he was acting within the course or scope of employment when the accident occurred, a predicate to the District Court's refusal to remand the case to the state court.

On direction from the court of appeals, the parties further briefed the issue of whether the District Court's 1996 refusal to remand the case to state court was proper in view of 28 U.S.C. Section 1445(a) and, if not, whether the court of appeals had subject matter jurisdiction to consider the case (App. 3). In response, Feichko's Supplemental Brief argued that his state court complaint alleged viable claims under both FELA and the BIA; that removal on its face violated the prohibitory provisions of 28 U.S.C. Section 1445(a); that the defendants should have filed their summary judgment motion in state court; and that the District Judge therefore considered and decided a dispute over which he had no subject matter jurisdiction (App. 4). Because of this fundamental lack of power by the federal district court to decide the issues surrounding Feichko's right to recover under FELA or the BIA, he further argued that the court of appeals lacked the subject matter jurisdiction to decide the case.

On May 31, 2000, the court of appeals issued its opinion *in Frank H. Feichko, Jr. v. Denver & Rio Grande Western Railroad Company; The Southern Pacific Transportation Company*, 213 F.3d 586(10 Cir. 2000)(App. 1-17). After reviewing the procedural history of the case as described herein, it concluded that it did not need to decide whether the District Judge had improperly considered and resolved the merits of Feichko's FELA and BIA claims because Feichko had waived the issue of improper removal by his failure to raise the issue on

appeal (App. 5).

Adverting to federal decisional law where the plaintiff in a removed action had acquiesced to the exercise of federal subject matter jurisdiction and analyzing this Court's decision in *Caterpillar Inc. v. Lewis*, 519 U.S. 61(1996), the court of appeals determined that a plaintiff's choice of a state forum for his FELA claims, guaranteed him by 28 U.S.C. Section 1445(a), could be overcome by considerations of judicial economy "particularly in view of the fact that Mr. Feichko did not renew his challenge to removal on appeal and instead sought relief from the district court rulings in this court" (App. 7).

Besides relying upon *Caterpillar*, the appellate tribunal also examined two other decisions of this Court (*Grubbs v. General Electric Credit Corp.*, 405 U.S. 699(1972) and *American Fire & Cas. Co. v. Finn*, 341 U.S. 6(1951)) to conclude that removal in violation of a statutory provision would not deprive a federal district court of subject matter jurisdiction so long as the court would have had original jurisdiction over the case had it been filed there in the first instance (App. 8-9). The court then stated:

> In line with the authorities cited above, we likewise hold that removal in violation of section 1445(a) may be waived by a plaintiff, either by a failure to move the district court to remand, as was the case in *Grubbs*, or by a failure to raise the issue on appeal, as in the instant case, so long as the district court would have had jurisdiction had the case originally been filed there.

(App. 9). The court thus concluded that it had subject matter

jurisdiction over this appeal by Feichko (App. 9).

Turning to the merits of the controversy, the court of appeals determined that the undisputed facts before the District Judge in 1996 revealed that Feichko was pursuing a purely private activity not incident to his employment and providing no benefit to the employer when the accident occurred (App. 11). It therefore decided that the District Court properly granted partial summary judgment to D&RGW and SP on Feichko's FELA and BIA claims (App. 11).

In reaching this result, the court of appeals rejected Feichko's assertion on appeal that he had been called to work on the day of the accident and was on the railroad's property in response to that call when the accident occurred (App. 15-16). This fact was adduced in his deposition taken ten months after the District Court had entered partial summary judgment against him on his statutory claims under FELA and the BIA (App. 15). Because this fact was not before the District Judge when he ruled and was ambiguous, the court saw no reason to depart from its caselaw prohibiting it from considering newly offered evidence in determining the propriety of a summary judgment granted on these statutory claims (App. 16).

Finally, the court of appeals affirmed the later summary judgment against Feichko on his common law negligence claims against D&RGW under state law (App. 12-14).

On June 21, 2000, Feichko duly petitioned the Court of Appeals for the Tenth Circuit for *En Banc* Consideration/Rehearing of his appeal. He argued *inter alia* that the court's panel decision conflicts with Article III of the federal constitution, decisions of this Court interpreting the federal courts' subject matter jurisdiction over wrongly removed cases and the principled decisions of this Court holding that the

subject matter jurisdiction of federal courts to decide a case or controversy can never be waived, even at the appellate level.

On July 19, 2000, the court of appeals denied Feichko's petition for *En Banc* Consideration/Rehearing (App. 31). Feichko has duly filed his petition for writ of certiorari within ninety days of the entry of this ruling. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446 (1974). *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384(1965). *United States v. Healey*, 376 U.S. 75, 77-78;80(1964).

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Fundamental Conflict With The Decisions Of This Court Defining the Subject Matter Jurisdiction of Federal Courts Over Cases Removed From State Court in Violation The Rules Prescribed by Congress.

In *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 71-77(1996), this Court considered the question of whether the federal district court possessed subject matter jurisdiction to decide the merits of a case wrongfully removed from state court (because there was an absence of complete diversity) if that defect was subsequently cured so that federal jurisdictional requirements were met at the time judgment was entered in federal court. *Id.* at 64.

The Kentucky plaintiff in *Caterpillar* filed lawsuit in a state court against several defendants, one of which was a Kentucky defendant. *Id.* at 64-65. When the Kentucky defendant apparently settled out of the suit, the remaining diverse defendants successfully removed the case to the United States District Court for the Eastern District of Kentucky, grounding federal jurisdiction on diversity of citizenship. *Id.* at

65. The plaintiff objected to the removal and moved to remand the case to state court. *Id.* In fact, the Kentucky defendant had not settled at the time of removal but did so after the case has been removed to federal court. *Id.* at 66. With diversity then complete, the matter proceeded to a six-day jury trial and ultimate judgment in the diverse defendant's favor. *Id.* at 66-67. On appeal, the Court of Appeals for the Sixth Circuit reversed be-cause at the time of removal, diversity was incomplete, there was no subject matter jurisdiction and therefore the District Court had erred in refusing the plaintiff's motion to remand the matter to state court. *Id.* at 67.

This Court granted the diverse defendant's petition for certiorari and reversed the court of appeals' decision. *Id.* In a unanimous opinion authored by Justice Ginsburg, this Court first acknowledged that the removal was improper in view of the then incomplete diversity of the parties and that the federal appeals court had correctly identified this defect in the removal procedure. *Id.* at 70. But it stopped short of requiring the reversal of the federal judgment in these circumstances. *Id.* at 70-71. It observed that even though there was a *statutory* misstep, i.e., removal in the absence of complete diversity, the *jurisdictional* defect of incomplete diversity was cured before trial and judgment. *Id.* at 73 (emphasis in original). With the record in this posture, this Court held that the court of appeals had erred in resting its decision on the absence of subject matter jurisdiction. *Id.* at 73.

Instead, this Court held that despite the district court's wrongful denial of the plaintiff's motion to remand, if "no jurisdictional defect lingered through judgment in the District Court," a remand to state court after a protracted trial and ultimate judgment in federal court would further neither the fair and unimpeded administration of justice nor the considerations finality, efficiency and economy inherent in our dual court

system. *Id.* at 75-77. But "despite a federal court's threshold denial of a motion to remand,...if, at the end of the day and case, a *jurisdictional* defect remains uncured [at the time of judgment], the judgment must be vacated." *Id.* at 76-77 (emphasis in original) citing Fed. R. Civ. P. 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). In so ruling, this Court explicitly rejected the notion that the plaintiff in *Caterpillar* could have waived his right to contest the denial of his motion to remand by failing to pursue an immediate interlocutory appeal therefrom under 28 U.S.C. section 1292(b). *Id.* at 74 & n.11.

This Court in *Caterpillar* relied upon two of its prior decisions to reach the result it did, i.e., *Grubbs v. General Electric Corp.*, 405 U.S. 699(1972) and *American Fire & Cas. Co. v. Finn*, 341 U.S. 6(1951). *Id.* at 70-73. The plaintiff in *Grubbs* never objected to the wrongful removal of his state court case to federal court, the case proceeded to judgment there and the federal jurisdictional peg existing at the time of the entry of judgment was, as in *Caterpillar*, the diversity of citizenship of the parties under 28 U.S.C. Section 1332. 405 U.S. at 701-704. In these circumstances, this Court held that regardless of whether the case was wrongly removed in the first place, where the federal district court has jurisdiction of the parties at the time judgment entered, the judgment was a valid one and not having objected to the removal at the time it occurred via a motion to remand, the plaintiff could not challenge the validity of the removal procedure "for the first time on appeal." *Id.* at 700.

In *Finn*, the Texas plaintiff sought relief in Texas state court and named two nonresident insurance carriers and a Texas insurance agent as the defendants. 341 U.S. at 7-8. Despite the

incomplete diversity of the parties, the two insurance companies successfully removed the action to federal district court despite the plaintiff's objection and motion to remand. *Id.* at 8. When judgment after trial entered against one of the nonresident insurance carriers and in favor of the two other defendants, the losing insurance carrier unsuccessfully sought to vacate the judgment arguing that the removal to federal court was unauthorized. *Id.* The court of appeals held the plaintiff's claims against the nonresident insurance carriers were "separate and independent" from the one against the resident agent, removable if sued upon alone, and therefore the entire suit was properly removed under the recent revision of 28 U.S.C. Section 1441(c). *Id.*

The *Finn* Court reversed this ruling and held that the dispute between the plaintiff and the nonresident carriers was not a "separate and independent claim or cause of action" within the new version of Section 1441(c), that removal was therefore unauthorized by statute and because diversity did not exist at the time of the judgment, there was no basis for federal jurisdiction. *Id.* at15-17. It therefore directed the district court to vacate the judgment and remand the matter to the Texas state court. *Id.* at 18-19. In so ruling, this Court emphasized that this revision of Section 1441(c) was enacted by Congress to limit the removal of state cases to federal courts and that Congress had also intended that result by its enactment of similar prohibitory statutes such as 28 U.S.C. Section 1445(a) for FELA claims. *Id.* at 9-10 & n.2. Finally, this Court in *Finn* noted that the doctrine of estoppel applied against one of the parties "cannot endow a federal court with jurisdiction it would not otherwise possess." *Id.* at 17.

Caterpillar, *Grubbs* and *Finn*, then, teach that where a uncured jurisdictional defect, not merely a statutory misstep, persists through the entry of judgment in a wrongly removed

case in the district court, the judgment must be vacated because the federal court lacked subject matter jurisdiction to decide the case. Moreover, a plaintiff who has objected to the removal by a motion to remand does not waive his right to contest this jurisdictional defect by failing to pursue an interlocutory appeal; and the doctrine of estoppel cannot be employed to endow a federal court with jurisdiction it would not otherwise possess.

With this law in mind, Feichko submits that the court of appeals' decision below is in fundamental conflict with these principles of subject matter jurisdiction enunciated by this Court for cases wrongly removed to federal court. Specifically, the court of appeals concludes that the wrongful removal of plaintiff's FELA claims to federal court in violation of 28 U.S.C. Section 1445(a) can be waived by a plaintiff even though he had promptly sought remand below and then challenged on appeal the fact-based question which caused the District Judge to refuse to remand the case to state court in the first place.

This reasoning mistakes the persistent, uncured *jurisdictional* defect of the wrongful removal of Feichko's FELA case in violation of Section 1445(a) which persisted through the entry of judgment as merely akin to a *statutory* violation which can be cured through conduct amounting to "waiver" long after judgment has entered; it emasculates Congress' clear intent to provide FELA plaintiffs with a meaningful and permanent choice of jurisdictions in which to pursue their FELA claims; it inappropriately imports into this jurisdictional analysis the doctrine of waiver at the appellate level in order to endow the federal court with jurisdiction which it did not otherwise possess; and it unduly expands the federal courts power in violation of Article III to hear wrongly removed cases in derogation of Congress' intent, expressed in unequivocal statutory language, that it not do so.

In the first place, the wrongful removal here is a fundamental *jurisdictional* defect which went to the very heart of the District Court's power to decide via summary judgment the fact-based question of whether Feichko was acting within the scope or course of his employment when he was injured. Beginning with its enactment by Congress in 1906 through its subsequent amendments over the years, FELA's provisions have been interpreted liberally so that its remedial objective of protecting railroad workers from the hazards they face on a regular basis is furthered. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432-436(1958). *Urie v. Thompson*, 337 U.S. 163, 191(1949). See *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 333-334(1974)(Douglas, J., dissenting).

Besides expanding the duty of railroads to insure the safety of its workers, simplifying the jury question of work-related injury (see *Baker v. Texas & P.R. Co.*, 359 U.S. 227, 228(1959)) and limiting the defense of contributory negligence, FELA's statutory scheme provides railroad workers such as Feichko with the choice of pursuing a claim in either state or federal court. See 45 U.S.C. Section 56 (federal courts shall have concurrent jurisdiction with state court for FELA claims). Moreover, 28 U.S.C. Section 1445(a) protects the choice of state court given Feichko by providing that once he files his FELA action in state court, it "may not be removed to any district court of the United States." See *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428-429(1965).

This grant of jurisdiction to state courts by 45 U.S.C. Section 56 combined with the prohibition against removal by 28 U.S.C. Section 1445(a) "clearly inhibits removal of a cause arising under [FELA] from a state court upon the sole ground of diversity of citizenship." *Kansas City Southern Ry. v. Leslie*, 238 U.S. 599, 602-603(1915) and cases cited. *Accord, Moore v. C.&O. Ry. Co.*, 291 U.S. 205, 216(1934).

With Feichko having chosen the Utah state court as the jurisdictional forum to hear his claims under FELA, the BIA and common law negligence, the federal courts possessed no jurisdiction to hear or decide this matter, regardless of the diversity of citizenship of the parties. See, e.g., *Chacon v. Atchison, Topeka and Santa Fe Railway Company*, 320 F.2d 331, 332-333(10th Cir. 1963); *Fox v. Norfolk & Western RY. Co.*, 755 F. Supp. 265, 267-268(E.D.Mo.1991); *Hall v. Illinois Central Railroad Company*, 152 F. Supp. 549, 552(W.D. Ky. 1957). After all, the jurisdiction of the federal courts to hear cases is limited not only by the provisions of Article III of the Constitution but also by the Acts of Congress, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371-372(1978); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694,702(1982), and Congress explicitly provided that the Utah state court was to be the only jurisdiction to hear Feichko's claims.

Removal by D&RGW and SP in the face of Congress' express statutory prohibition forbidding them from doing so is much more than the "statutory misstep" described in *Caterpillar*. 519 U.S. at 73. The prohibited procedure infected the foundation of the authority and power of the federal court to decide any aspect of Feichko's claims thereafter. Moreover, when Feichko timely but unsuccessfully moved to remand the matter to state court, this unresolved jurisdictional issue remained in the case and persisted up to and after the time of the entry of judgment in the District Court. See *Finn*, 341 U.S. at 16-17. The defect was never cured, the federal district court never possessed subject matter jurisdiction when it entered judgment on each of Feichko's claims and the judgments accordingly should have been vacated. *Caterpillar*, 519 U.S. at 76-77.

In these circumstances, this Court's observation in *Finn*

is apt:

> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.

341 U. S. at 17-18.

Indeed, this Court's analysis in *Caterpillar*, *Grubbs* and *Finn* never addressed the effect of such prohibitory language as contained in 28 U.S.C. Section 1445(a) upon the propriety of a federal court's assumption of subject matter jurisdiction in the wake of a wrongful remand. In each of those cases, the federal jurisdictional peg was diversity of citizenship and whether this neutral prerequisite had been achieved at the time judgment had entered in the district court. Accordingly, none of these cases reasonably provide the rationale attributed to them by the court of appeals here to reach the result it did.

In the second place, the court of appeals' resort to the doctrine of waiver to endow it and the federal district court with the subject matter jurisdiction it never possessed in the first place is wrong as a matter of law. This Court has established that subject matter jurisdiction of the federal courts in any proceeding is an Article III as well as a statutory requirement. *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. at 702.

Flowing from this principle is the corollary that no action by the parties can confer such jurisdiction; and the consent of the parties is irrelevant. *Id.* citing *California v. LaRue*, 409 U.S. 109(1972). *Mansfield, C. & L. M. Ry. v. Swan*, 111 U.S. 379, 382(1884). Thus a party cannot waive the defense of a lack of subject matter jurisdiction, cannot be estopped from raising it and indeed may raise it at any time during the proceedings, even on appeal and even before this Court. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541(1986). *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. at 702. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 371-372; 374; 377. See also *Mitchell v. Southern Ry. Co.*, 247 F. 819, 821-822(N.D. Ga. 1917); *Patton v. Cincinnati, N. O. & T. P. Ry.*, 208 F. 29, 30-31(E.D. Tenn. 1913).

In *Mitchell v. Maurer*, 293 U.S. 237, 244(1934), this Court further observed:

> Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate court must satisfy itself not only of its own jurisdiction, but also that of the lower courts in the cause under review....Hence, the failure of the [petitioner] to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit... [is]immaterial....

A fortiori, Feichko's failure to raise in his Opening and Reply Briefs before the court of appeals the precise issue of the lack of the District Court's subject matter jurisdiction, instead challenging the fact-based question which caused the District Judge to refuse to remand the matter to state court, cannot provide the basis for inferring a waiver on his part of the

jurisdictional issue. In any event, the court of appeals requested further briefing on the jurisdictional issue; Feichko responded by challenging the lower court's jurisdictional power to decide his claims both in a supplemental brief and in his petition for *En Banc* Consideration/Rehearing. Thus, even though immaterial under this Court's decisional law, Feichko's filings have not waived the question of the authority of either the district court or the court of appeals to decide the merits of his claims under FELA, the BIA and common law negligence.

Finally, the court of appeals' ruling unlawfully expands the federal courts power in violation of Article III to hear wrongly removed cases in derogation of Congress' intent, expressed in unequivocal statutory language, that it not do so. *Bender v. Williamsport Area School District,* 475 U.S. at 541-543. *Bankers Trust Co. v. Tex. & Pac. Ry.*, 241 U.S. 295, 305 (1916). It follows that if a district court and the court of appeals do not have subject matter jurisdiction over Feichko's action, then its decisions respecting that action are void and must be reversed. *Catholic Conf. v. Abortion Rights Mobilization*, 487 U.S. 72, 76 (1988).

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the Court of Appeals for the Tenth Circuit and, ultimately, a new order should issue vacating and reversing the judgment and remanding the matter to the United States District Court for the District of Utah with directions that it remand Feichko's civil action to the state courts of Utah for further proceedings; or this Court should provide him with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 98-4154

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK H. FEICHKO, JR.,
Plaintiff-Appellant,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY;
THE SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Defendants-Appellees,

May 31, 2000, Filed

OPINION:

SEYMOUR, Chief Judge.

Frank H. Feichko originally brought this action in state court against his employer, the Denver & Rio Grande Western Railroad (D&RGW), and the Southern Pacific Transportation Company (SP) for injuries he sustained while he was standing in a parked D&RGW locomotive that was struck by a moving SP locomotive. Mr. Feichko asserted three claims against each defendant, seeking damages under the Federal Employer's Liability Act (FELA), 45 U.S.C. § § 51 et seq., the Boiler Inspection Act (BIA), 45 U.S.C. § § 23 et seq.,[1] and common law negligence.

Defendants removed the case to federal district court and moved for partial summary judgment. Mr. Feichko moved to remand on the ground that the first two claims were not removable under 28 U.S.C. § 1445(a), which prohibits the removal of FELA claims filed in state court. The district court dismissed the FELA and BIA claims against D&RGW and all claims against SP as a matter of law, and then denied the motion to remand.[2] After extended discovery, the court granted D&RGW's motion for summary judgment on the remaining common law negligence claim. See Feichko v. Denver & Rio Grande Western R.R., 13 F. Supp. 2d 1212 (D. Utah 1998). Mr. Feichko appeals and we affirm.

I

In January of 1993 Mr. Feichko, a locomotive engineer for D&RGW, came to the D&RGW property on his day off to look for a checkbook he thought he might have left there during the previous day's shift. He was directed to two D&RGW workmen who were cleaning locomotives. They told him they had not seen the checkbook and suggested he look in the parked engines. Mr. Feichko did so. While he was on board one of the parked engines, a moving locomotive collided with it, knocking him into the control stand and console and causing him serious injuries. The moving engine was owned by SP and operated by D&RGW employees at the time of the accident.

Mr. Feichko sought recovery under the FELA, contending that his employer breached its statutory duty to provide him a reasonably safe place to work, safe equipment, and safe procedures. He also claimed under the BIA for breach of the statutory duty to maintain the brakes of the moving locomotive in a safe condition. Finally, Mr. Feichko asserted claims of common law negligence, alleging that defendants violated their statutory duties under the above acts and were negligent in their operation of the moving

locomotive and in failing to warn him that the collision was imminent.

Defendants removed the case to federal district court under 28 U.S.C. § 1441(b), which provides for the removal of cases where the federal court has original jurisdiction on the basis of diversity of citizenship.[3] Mr. Feichko moved to remand the action to state court, arguing that it was not removable under 28 U.S.C. § 1445(a), which provides that "[a] civil action in any State court against a railroad or its receivers or trustees, arising under [the FELA] may not be removed to any district court of the United States." Id.[4]

The federal district court determined that Mr. Feichko had failed to establish the elements of a claim under either the FELA or the BIA and that he had failed to show he was an employee of SP. The court then ruled that since neither the FELA nor the BIA claims could stand, those claims need not be remanded. The court further held that the common law negligence claim was properly removed and was not subject to remand. In a subsequent ruling, the court granted summary judgment for D&RGW on Mr. Feichko's negligence claim, concluding that D&RGW owed him no duty under the circumstances.

On appeal, Mr. Feichko contends that material issues of fact exist regarding whether his claim falls within the scope of the federal statutes, and that the district court improperly decided disputed issues of fact in granting summary judgment on his common law negligence claim. Although Mr. Feichko did not raise the denial of his motion to remand, we were concerned that the matter might present a question of subject matter jurisdiction. We therefore directed the parties to submit supplemental briefing on whether this case was properly removed in view of section 1445(a) and, if not, whether we have subject matter jurisdiction to consider the case. As discussed below, we are satisfied that federal subject matter jurisdiction is present. Moreover, our review of the

merits persuades us the district court's disposition was correct.

II

The district court addressed Mr. Feichko's motion to remand together with defendants' motion for summary judgment. The court granted the defendants partial summary judgment, concluding on the undisputed facts that Mr. Feichko was not acting within the scope of his employment at the time of his injuries and that his claims under the FELA and the BIA were therefore not sustainable as a matter of law. The court also denied the motion to remand, notwithstanding section 1445(a), based on its ruling that neither statutory claim could stand.

In his supplemental brief, Mr. Feichko contends the court erred in reaching the merits because removal of a FELA case is barred by section 1445(a). Defendants maintain that denial of the motion to remand was proper under these circumstances, pointing to cases holding that such a denial is permissible when the district court determines that the plaintiff's claims are baseless in law and fact. See Yawn v. Southern Ry., 591 F.2d 312 (5th Cir. 1979); Aldredge v. Baltimore & Ohio R.R., 20 F.2d 655 (8th Cir. 1927). These holdings are premised on the notion that a defendant seeking removal may "pierce the pleadings" of a lawsuit asserting claims that are ostensibly barred by section 1445(a) to show that the claims have been fraudulently pled to avoid removal. Burchett v. Cargill, Inc., 48 F.3d 173, 175-76 (5th Cir. 1995) (reviewing action under Jones Act, which incorporates provisions of FELA, including section 1445(a) removal bar). Courts applying this exception to section 1445(a), however, have recognized the tension between a defendant's right to demonstrate the baseless nature of a claim and a plaintiff's right to choose a state court forum. See Lackey v. Atlantic Richfield Co., 990 F.2d 202, 207-08 (5th Cir. 1993) (holding district court should have remanded case because defendants

failed to meet burden of demonstrating that Jones Act claim was "undisputedly false"); see also Burchett, 48 F.3d at 176 (cautioning against pretrying a case to determine removal jurisdiction). These courts have not always drawn a bright line between assessing whether a statutory claim is so legally baseless as to constitute a fraudulent attempt to prevent removal and assessing whether the plaintiff has merely failed to state a claim, a determination otherwise committed to the state courts.

We acknowledged in Chacon v. Atchison, Topeka & Santa Fe Ry., 320 F.2d 331 (10th Cir. 1963), that a fraudulent attempt to evade removal may provide an exception to the operation of section 1445(a), but we concluded that the exception did not apply in that case.

> It is settled law that a civil action brought in a state court of competent jurisdiction against a railroad company subject to the act to recover damages for personal injuries is not open to removal to the district court of the United States solely on the ground of diversity of citizenship. And in the absence of any issue of a fraudulent attempt to evade removal, the question whether an action instituted in the state court is one under the act is to be determined by reference to the allegations contained in complaint or petition, as the case may be.

Id. at 332 (citations omitted). We need not decide here whether the district court improperly resolved the merits of a claim committed to the state courts instead of remanding the matter. As we discuss below, we hold that a removal barred by section 1445(a) does not in these circumstances present a matter of subject matter jurisdiction. The issue of improper removal was therefore waived by Mr. Feichko's failure to raise it on appeal.

We have held as a general matter that

> where a suit of which the United States Court may entertain original jurisdiction is instituted in the state court and the defendant obtains its removal, even though the removal is irregular, defective, or unauthorized, and plaintiff acquiesces in such removal by seeking relief from the United States Court, that court acquires jurisdiction of the subject matter.

American Oil Co. v. McMullin, 433 F.2d 1091, 1094 (10th Cir. 1970) (quoting Parks v. Montgomery Ward & Co., 198 F.2d 772, 774 (10th Cir. 1952)); see also Donahue v. Warner Bros. Pictures, Inc., 194 F.2d 6, 10 (10th Cir. 1952) (when suit over which federal district court would have original jurisdiction is brought in state court and defendant obtains wholly unauthorized removal, federal court acquires jurisdiction when plaintiff acquiesces by seeking relief from federal court); Lopata v. Handler, 121 F.2d 938, 940 (10th Cir. 1941) (same). Although these cases are not of recent vintage, current authority indicates they are still good law and are applicable here.

The Supreme Court has addressed similar factual circumstances in several opinions. In the most recent of these, a case originally filed in state court asserting personal injury claims under state law was removed to federal court at a time when complete diversity of citizenship did not exist. See Caterpillar Inc. v. Lewis, 519 U.S. 61, 136 L. Ed. 2d 437, 117 S. Ct. 467 (1996). A prompt remand motion was denied, the nondiverse parties were thereafter dismissed, and the case proceeded to trial and judgment. The appellate court vacated the judgment, concluding that, absent complete diversity at the time of removal, the district court lacked subject matter jurisdiction.

The Supreme Court reversed, holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 117 S. Ct. at 471. The Court recognized that "the statutory flaw" caused by the defendant's failure to meet the requirements for removal remained in the history of the case even though complete diversity was subsequently obtained and subject matter jurisdiction was therefore established before trial commenced. Id. at 475. The Court concluded, however, that adherence to the rules Congress prescribed to preserve a plaintiff's choice of forum was outweighed by "considerations of finality, efficiency, and economy." Id. at 476.

> In this case . . . no jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

Id. at 477.

We note that in Caterpillar, unlike the instant case, the plaintiff raised the propriety of removal on appeal and argued that he had done all he could to preserve the choice of forum provided him by federal statute. The Court nonetheless felt that these considerations were overcome by the fact that the court had subject matter jurisdiction at the time of judgment, and by concern for judicial economy. We believe the same balance should be struck here, particularly in view of the fact that Mr. Feichko did not renew his challenge to removal on appeal and instead sought relief from the district court rulings in this court.

The Court in Caterpillar discussed two earlier cases, Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 31 L. Ed. 2d 612, 92 S. Ct. 1344 (1972) and American Fire & Cas. Co. v. Finn, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951). The Court found these cases helpful and they likewise shed light on our inquiry. In Grubbs, although the plaintiff did not move to remand, the Court of Appeals sua sponte concluded that the removal was not authorized by statute and that the case should therefore be remanded to the state court in which it had originated. The Supreme Court disagreed and concluded that so long as the district court had jurisdiction at the time it entered judgment, the validity of the removal procedure could not be raised for the first time on appeal. See Grubbs, 405 U.S. at 700.

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Id. at 702.

In Finn, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534, the Court similarly referred in dicta to prior cases decided by it and by circuit courts

> which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of

> the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied upon as the foundation of the holdings.

Id. at 16-17 (footnote omitted).

In our view, Caterpillar, Grubbs, and Finn all indicate that removal in violation of a statutory provision does not deprive a federal district court of subject matter jurisdiction so long as the court would have had original jurisdiction over the case had it been filed there in the first instance. See Belcufine v. Aloe, 112 F.3d 633, 638 (3d Cir. 1997) (relying on Grubbs and Caterpillar in holding that removal in violation of statute is not jurisdictional and therefore waivable when cause of action could have been brought originally in federal court); Barbara v. New York Stock Exch. Inc., 99 F.3d 49, 55-56 (2d Cir. 1996) (relying on Grubbs and Finn for same proposition). Indeed, two other circuits have expressly held that a removal in violation of section 1445(a) is a waivable non-jurisdictional defect when the federal court could have exercised subject matter jurisdiction had the case originally been brought there. See Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116 (5th Cir. 1987) (en banc); Carpenter v. Baltimore & Ohio R.R., 109 F.2d 375, 379-80 (6th Cir. 1940).

In line with the authorities cited above, we likewise hold that removal in violation of section 1445(a) may be waived by a plaintiff, either by a failure to move the district court to remand, as was the case in Grubbs, or by a failure to raise the matter on appeal, as in the instant case, so long as the district court would have had jurisdiction had the case originally been filed there. Accordingly, we have jurisdiction over this appeal.

III

The district court granted defendants' motion for summary judgment on the statutory claims, concluding as a matter of law that Mr. Feichko had not made the requisite showing that his injuries occurred while he was acting within the scope of his employment or in furtherance of the railroad's interests. On appeal, Mr. Feichko argues that the FELA constitutes broad remedial legislation which the district court failed to construe liberally, and that whether the accident occurred within the scope of his employment is a disputed fact issue that should be decided by a jury.

The FELA provides a remedy for

> any person suffering injury while he is employed by [a common carrier by railroad] in [interstate] commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, . . . or other equipment.

45 U.S.C. § 51. Recovery under the FELA is thus permitted only if the employee's injury occurred while he was employed by the railroad, which in turn requires a showing that "the plaintiff was injured in the scope of his employment." Smith v. Medical & Surgical Clinic Ass'n, 118 F.3d 416, 419 (5th Cir. 1997). Railroad employment has been broadly interpreted to extend not only to acts required by the employer, but also to those acts necessarily incidental to the employment. See, e.g., Rostocki v. Consolidated Rail Corp., 19 F.3d 104, 106 (2d Cir. 1994) (FELA covers injuries suffered during activities necessarily incidental to employment); Wilson v. Chicago, Milwaukee, St. Paul, & Pac. R.R., 841 F.2d 1347, 1355 (7th Cir. 1988) (act could be

within scope of employment if a necessary incident of the day's work).

This circuit and others have nevertheless held that even "given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment." Atchison, Topeka & Santa Fe Ry. v. Wottle, 193 F.2d 628, 630 (10th Cir. 1952); see also Smith, 118 F.3d at 419 (citing Wottle); Rostocki, 19 F.3d at 106 (same); Wilson, 841 F.2d at 1355 (same). The district court here applied Wottle and concluded that Mr. Feichko "was not acting within the scope of his employment pursuant to any duties or in furtherance of the railroad's interest when the injuries were sustained." Aplt. App. at 97. The court held that Mr. Feichko's search for his missing checkbook was an activity with a private purpose having no causal relationship with his employment, that the search was not done under the direction and authority of the employer, and that the employer could not have reasonably foreseen the search and did not benefit from it.

Mr. Feichko contends the district court erred in making this determination as a matter of law, asserting that the question must be decided on its particular facts and citing cases in which the issue was presented to the jury. The cases Mr. Feichko cites are all distinguishable because they contain factual disputes material to the issue of whether the activity resulting in the injury was for a purely private purpose or was incidental to the plaintiff's employment. Here the material facts are not disputed. They reveal that Mr. Feichko was pursuing a purely private activity which was not incidental to his employment and which provided no benefit to his employer.[5] Accordingly, the district court properly granted summary judgment to defendants on the statutory claims.[6]

In a subsequent ruling, the district court granted summary judgment for D&RGW on Mr. Feichko's common law negligence claim, holding that Mr. Feichko was a licensee under Utah law and that the railroad owed him no duty under the circumstances. See Feichko, 13 F. Supp. 2d at 1214-15. The court pointed out that Utah has adopted the RESTATEMENT (SECOND) OF TORTS § 341 (1965), under which a landowner owes no duty of care to a licensee who knows the nature of the activities conducted on the land and the manner in which they are conducted. Id. at 1214 (quoting § 341 cmt. a). The court concluded as a matter of law that Mr. Feichko, as an experienced railroad engineer, had the requisite knowledge, and rejected his argument that he did not assume the risk that the railroad would conduct its activities negligently. The court held that adopting Mr. Feichko's construction of the landowner's duty to a licensee "would effectively eliminate the traditional rules limiting recovery on the part of such licensees by applying a negligence standard any time negligence might have occurred." Id. at 1215.

Mr. Feichko asserts that the district court erred by assuming the extent of his knowledge and by in effect ruling that he should have anticipated the negligent conduct of the railroad. We disagree. The Utah courts have followed the RESTATEMENT (SECOND) OF TORTS, under which a property owner's duty to a person injured on his property is determined by that person's status on the property as either an invitee, a licensee, or a trespasser. See Pratt v. Mitchell Hollow Irrigation Co., 813 P.2d 1169, 1172 (Utah 1991); Tjas v. Proctor, 591 P.2d 438, 441 (Utah 1979). Mr. Feichko does not dispute the fact that his status at the time of his injury was that of a licensee. Section 341 of the Restatement governs the liability of a landowner to a licensee for activities conducted on the land and provides:

> A possessor of land is subject to liability to his licensees for physical harm caused to them by

> his failure to carry on his activities with reasonable care for their safety if, but only if,
> (a) he should expect that they will not discover or realize the danger, and
> (b) they do not know or have reason to know of the possessor's activities and of the risk involved.

RESTATEMENT (SECOND) OF TORTS § 341.

The comments to that section provide additional guidance on its application, stating:

> If a [licensee] knows of the nature of the activities conducted upon the land and the manner in which they are conducted, he has all that he is entitled to expect, that is, an opportunity for an intelligent choice as to whether or not the advantage to be gained by coming on the land is sufficient to justify him in incurring the risks involved.

Id. cmt. a. Significantly, the commentary further provides:

> The possessor, therefore, is not required either to refrain from or to give warning of activities dangerous to the licensee if they are, to the knowledge of the licensee, so customarily carried on upon the land that the licensee should be on the alert to discover and avoid them.

Id. cmt. d.

It is undisputed that Mr. Feichko was an experienced railroad engineer who knew the activities customarily carried on in a railroad yard and the risks those activities presented. Indeed, the D&RGW safety rules and Mr. Feichko's own statements establish that he knew collisions such as the one at issue here regularly occur in the course of railroading activity.[7] We agree with the district court that Mr. Feichko's

argument would, contrary to the express language of the Restatement and its commentary, render a landowner liable to a licensee for negligence despite the licensee's knowledge of the nature of the landowner's activity and the risk involved.[8] Section 341 and its commentary clearly provide that a landowner owes no duty to a licensee to conduct his activities with reasonable care if the licensee knows the nature of those activities and the risks involved. Accordingly, we conclude that summary judgment was properly granted against Mr. Feichko on his common law negligence claim.

In sum, we AFFIRM the judgment of the district court.

Footnotes

[1] The events giving rise to this lawsuit took place in January 1993. Subsequently, the BIA was repealed and recodified without substantive change as 49 U.S.C. § 20701. See Pub.L. No. 103-272, 108 Stat. 745 (1994). This opinion will refer to the BIA as it was codified in 1993.

[2] The district court granted summary judgment for SP on the ground that Mr. Feichko was not an employee of SP. Mr. Feichko does not challenge this ruling on appeal and therefore we do not address it. Thus, only D&RGW is properly before this court as an appellee.

[3] Section 1441(b) provides that when original federal jurisdiction is based on diversity of citizenship, the action is "removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Mr. Feichko was a citizen of Utah. Defendant D&RGW was a Delaware corporation with its principle place of business in Colorado, and SP was a Delaware corporation with its principle place of business in California. The requirements for removal under section 1441(b) were thus met.

[4] The BIA does not create an independent cause of action for personal injuries, and such an action must therefore be brought pursuant to the FELA. See Urie v. Thompson, 337 U.S. 163, 188-89 & n.30, 93 L. Ed. 1282, 69 S. Ct. 1018 (1949); O'Loughlin v. National R.R. Passenger Corp., 928 F.2d 24, 26 n.3 (1st Cir. 1991).

[5] Mr. Feichko asserts for the first time on appeal that he had been called to work on the day of the accident and was on the railroad's property in response to that call. In support of this assertion, he offers a statement he made in a deposition taken almost ten months after the court granted summary judgment to defendants on the FELA and BIA claims. Mr. Feichko's argument is unacceptable. First, the

argument and evidence were not before the district court at the time it ruled on the summary judgment motion. In reviewing a grant of summary judgment, our inquiry is limited to the summary judgment record before the district court when the motion was decided. See Allen v. Minnstar, Inc., 8 F.3d 1470, 1475 & n. 4 (10th Cir. 1993) (citing cases). We reject Mr. Feichko's contention that we should make an exception to this rule in the interest of preventing injustice. He has offered no explanation for his failure to present this evidence to the district court by way of affidavit in response to defendants' motion for summary judgment. Moreover, the deposition statement is ambiguous as to whether Mr. Feichko was in fact called to work on Sunday, the day before the accident, or on Monday, the day of the accident. Under these circumstances, we see no reason to depart from our caselaw by considering this newly offered evidence in assessing the propriety of the summary judgment granted on the statutory claims.

[6] Because the BIA is considered in substance an amendment to the FELA and enforced under that Act, see Urie v. Thompson, 337 U.S. 163, 188-89, 93 L. Ed. 1282, 69 S. Ct. 1018 (1949), Mr. Feichko's failure to establish that he was acting within the scope of his employment at the time of the accident is dispositive of his claim under both statutes.

[7] In a statement recorded after the accident, Mr. Feichko admitted that he had been involved in other impacts during his railroad career. See Aplt. App. at 52. He further stated by deposition that he had seen collisions that had knocked windows open, water off water coolers, and cars onto the ground. See id. at 152. He also testified that he had been involved in situations in which he had applied the brakes in a locomotive and the engine had slid, and that he had been on an engine that slid in the cold snow as had apparently happened in the accident at issue. See id. at 158-61.

[8] Mr. Feichko cites numerous cases in support of his argument, all of which are factually distinguishable. His reliance on Kurn v. Stanfield, 111 F.2d 469 (8th Cir. 1940), is misplaced. There the plaintiff brought an action under the FELA for injuries he sustained while acting as an employee. The case thus says nothing about a railroad's duty to a licensee. Marchello v. Denver & Western Rio Grande R.R., 576 F.2d 262 (10th Cir. 1978), and Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978), are likewise inapposite as both considered the application of section 342 of the Restatement, which addresses dangerous conditions rather than the dangerous activities covered by section 341. In any event, section 342 applies only when "the licensees do not know or have reason to know of the condition and the risk involved." RESTATEMENT (SECOND) OF TORTS § 342(c). Connor v. Union Pac. R.R., 972 P.2d 414 (Utah 1998), addresses the application of a narrow exception to RESTATEMENT (SECOND) OF TORTS § 334 under which a landowner may owe a duty of care to an habitual trespasser. It thus does not address the circumstances here. Other cases cited by Mr. Feichko are similarly unpersuasive as they involve a landowner's duty to trespassers or a railroad's duty to employees

Case No. 2: 95 CV 1068 K
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH,
CENTRAL DIVISION

FRANK H. FEICHKO, JR.,
Plaintiff,

v.

DENVER & RIO GRANDE WESTERN RAILROAD,
Defendant.

August 6, 1996

OPINION:

ORDER

This matter is before the court on defendants' motion for partial summary judgment and plaintiff's motion to remand. Plaintiff is represented by Richard I. Ashton of Ashton, Braunberger, Poulsen & Scud, and John J. Ross! of Morrisard, Rossi, Cox, Kiker & Inderwish. Defendants are represented by Casey K. McGarvey and E. Scott Savage of Berman, Gaufin, Tomsic & Savage. Extensive written submissions and oral argument were presented and the motions were taken under advisement. Now being fully advised, the court issues its Memorandum Decision and Order.

FACTUAL BACKGROUND

The following facts are undisputed. On Sunday, January 10, 1993, plaintiff completed his shift as locomotive

engineer for Denver & Rio Grande western Railroad (D&RGW) and went to his home in Price, Utah. Plaintiff had no further duties until his scheduled return to work the following Tuesday. On Monday morning, his scheduled day off, plaintiff could not locate his checkbook and called the D&RGW Road Foreman of Equipment, who told him that "nobody had seen it, nobody turned it in."[1] That afternoon and on his own accord plaintiff continued his search by going to the D&RGW property in Helper, Utah. The Road Foreman confirmed that the checkbook had not been located and told plaintiff to ask two D&RGW carman/machini5ts cleaning the locomotives if they had found the checkbook. Plaintiff did so, and recalls that one carman/machinist said, "[We're] so busy . [we] weren't even looking for anything like that.... [why] don't you come up and look on these [parked] locomotives."[2] Plaintiff determined to go upon the locomotives.

While plaintiff was searching, a moving locomotive approaching the area failed to brake and collided with the parked locomotive plaintiff was occupying, causing his alleged injuries. The moving locomotive was owned by the Southern Pacific Transportation Company (SP), which at all pertinent times was a separate corporate entity from the D&RGW. At the time of the accident, the moving locomotive was under the control of and was operated by employees of the D&RGW. Plaintiff was employed by and received his remuneration from D&RGW, and had no financial or other relationship with the SF.

STANDAND FOR SUMMARY JUDGMENT

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the supporting documentation supplied by the moving party shows entitlement to judgment as a matter of law. Fed. R. Civ. p. 56. In determining whether an issue of material fact exists, the

court views all facts and inferences in favor of the nonmoving party. Clemmons v. Bohannon, 956 F.2d 1523, 1525 (10th Cir. 1992)

ANALYSIS

Plaintiff asserts three separate claims against both defendants: 1) damages pursuant to 45 U.S.C. § 51, et seq., Federal Employer's Liability Act (FELA); 2) damages pursuant to 45 U.S.C. § 23 et seq., Boiler Inspection Act (BIA); and 3) common law negligence. Plaintiff originally filed this action in the Seventh Judicial District Court of Utah in Carbon County and defendant removed to this court under 28 U.S.C. § 1441. Plaintiff claims that under 25 U.S.C. § 1445 the first two causes of action are not removable.

Defendants claim as a matter of law that plaintiff's search for his checkbook at the time of the injury was a personal non-job related venture, not part of his duties or within the scope of his employment. Defendants also submit that plaintiff failed to show that SP was plaintiff's employer or that it owed any duty to plaintiff under the FELA and BIA. Accordingly, defendants urge partial summary judgment and oppose remand, leaving for trial in this court only the third claim - common law negligence - against defendant D&RGW

I. Scope of Employment under FELA

The critical issue presented is whether plaintiff was acting within the scope of his employment under E'ELA. The BIA does not create an independent cause of action for personal injuries, and claims raised thereunder are governed by the FELA.[3]

It has long been established that in order to show employer's liability under the FELA,[4] an employee must prove 1) he was

injured while in the scope of his employment; 2) his employment was in furtherance of his which we are here confronted is whether the injury of the employee occurred while he was acting within the scope of employment in furtherance of the railroad's interest. The employee bears the burden of proof to establish such.[6]

Plaintiff seeks to avoid summary judgment on three grounds. First, that his actions in searching for his lost checkbook were incidental to his employment. Second, that he was given permission to search tot his property. Third, that the railroad could foresee that it would be reasonably necessary for an employee to search for lost property and that such action would benefit the railroad. These propositions will be considered seriatim.

As to the first ground asserted by plaintiff to defeat summary judgment, plaintiff points to the case of Atchison Topeka & Santa Fe Ry. Co. v. Wottle, 193 F.2d 628, 629 (10th Cir. 1952) cert. granted, 343 U.S. 963 (1952), cert. dismissed, 344 U.S. 850 (1952), in which the Tenth Circuit posited that the FELA covers not only the actual work performed in interstate commerce, but also actions and work which are necessarily incident to employment. The court said:
It is no longer doubted that the Employer's Liability Act [FELA] extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto.[7]

Then, consistent with the general rule that commuting to and from work is not within the scope of employment,[8] the Tenth Circuit said that the FELA does not cover activities undertaken by an employee for a private purpose and having no causal relationship with employment. [9]
(4th Cir. 1994)

As support for its conclusion, the Tenth Circuit reasoned that

if the FELA could be extended to cover off-duty activities of an employee, including those intended to sustain or prepare him for his employment, there would be no limitation upon coverage so long as the employee returned to his duties the next day. The Court concluded that FELA "was not intended to go so far." Atchison 193 F.2d at 630.

Plaintiff cites Brown v. Union Pac. R.R., 235 P.2d 506 (Utah 1951) in which case an employee brought suit against a railroad for injuries sustained while en route to another job. However, in Brown, it was the employee's drinking and taking much longer than expected to reach the job site which presented a question of fact for the jury. In the case at bar, plaintiff was not en route to another job at the time of injury. He clearly had finished his shift and was po longer required to be on the D&RGW property. Plaintiff also cites Betoney v. Union Pac. R.R., 701 P.2d 62 (Colo. Ct. App. 1984) where the court ruled that reasonable minds could have differed as to whether an employee while returning from a personal trip to town to his bunk car provided by the railroad was within the scope of his employment. However, the Betoney case is inapposite because the employee in that case was required by the railroad to sleep in the bunk car. In the case at bar plaintiff was not required to return to the railroad properties at the time he was injured. Other cases cited by plaintiff are likewise distinguishable. [10]

Applying the Atchison guidelines, this court determines that plaintiff was not acting within the scope of his employment pursuant to any duties or in furtherance of the railroad's interest when the injuries were sustained. Plaintiff's personal search for his checkbook was unrelated to his employment and bears no causal relationship with his duties as a D&RGW engineer.

The second ground urged by plaintiff is that he was following the direction and authority of his employer because

his "supervisor" gave him "permission" to search the locomotive. Counsel for plaintiff uses the term "supervisor", "Road Foreman of Engineers" [11] and "Road Foreman of Engines"[12] interchangeably in reference to the person who allegedly gave plaintiff permission to search the locomotive, but in his sworn statement to the Claim's Representative, plaintiff said that it was the "Road Foreman of Equipment" who suggested that he ask the carman/machinists about the lost checkbook.[13] Plaintiff then responded to the suggestion of a carman/machinists by conducting the search himself. Plaintiff has offered nothing from which a jury could conclude that the carman/machinists, Road Foreman of Engines, or the Road Foreman of Equipment was authorized to permit the search or that they in fact authorized the search. This court concludes from the undisputed evidence that plaintiff was not following the direction and authority of a supervisor authorized by his employer when he chose to board the locomotive and search for himself.

As a third ground in opposition to summary judgment, plaintiff claims that the railroad could have reasonably foreseen that employees would be within its engines for purposes such as the search for missing property. Plaintiff further argues that such foreseeable conduct would be of benefit to the employer as well as the employee. However, plaintiff admits that he was not called to work, was not being paid for his time, and was on off-- duty status. This court rules that the railroad could not reasonably have foreseen that plaintiff would be in the engines conducting a search while off duty. Further, the railroad received no benefit from plaintiff's voluntary actions.

Based upon the foregoing, defendants' motion for partial summary judgment as to the FELA and BIA claims should be granted.

II. Employment Status Under FELA

In order to establish a claim of liability under the FELA, an employer—employee relationship must exist. The concept of employment for purposes of FELA is broader than the simple inquiry of where the paycheck comes from. A railroad can be held liable as an "employer" even though a worker is not on the payroll.

The test essentially is one of control.[14] In this regard, the Tenth Circuit has noted that many relevant factors bear upon the "right to control", including but not limited to (1)the extent of control which . . . the employer may exercise over work details, (2) whether or not the employer supplies the tools and the place of work, (3) the length of time for which the person is employed, (4) the method of payment, and (5) whether or not the parties believe they are creating the relation of master and servant.[15]

In the case at bar, plaintiff claims that "he may have" been a "joint employee" of both D&RGW and SF. Upon applying the aforesaid "right to control factors" to this case however, it is apparent that plaintiff has not demon5trated (I) that SP had control over the details of plaintiff's work, (2) that it supplied the tools or place of work for plaintiff, (3) that plaintiff was "employed" by SP for any length of time, (4) that plaintiff was paid as an employee of SP, and (5) that SE believed or acted in such a way as to indicate that there was a master-servant relationship with plaintiff. While no one factor of an employer---employee relationship is determinative, the sole evidence plaintiff submits is a form letter from SP informing its employees of 401(k) benefits and a copy of the "Central Region Timetable" which contains the SF logo. Plaintiff does not claim that the pension plan letter was sent to him or that he has ever relied upon the SP for benefits thereunder. The timetable clearly is not enough to

show a relationship of control or direction by the SP over the actions of plaintiff.

This court rules that plaintiff has not made an adequate showing from which a jury could determine the existence of sufficient control to establish the SF as an employer of plaintiff. Accordingly, plaintiff's claims against defendant Southern Pacific should be dismissed.

III. Removal from State Court of FELA Cases

28 U.S.C.A. § 1445 provides in pertinent part that

> (a)A civil action in any state court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

Since this court has ruled that neither the pending FELA nor BIA can stand, the first two claims for relief could not be remanded. However, plaintiff's common law negligence claim was properly removed to federal court and it is not subject to remand.

For the foregoing reasons, Defendant's Motion for Partial Summary Judgment is GRANTED and Plaintiff's Motion to Remand is DENIED.

Counsel for defendants is directed to prepare and lodge with the court a farm of judgment consistent with this Memorandum Decision and Order, after first complying with local Rule 212(b).

IT IS SO ORDERED.
DATED: August 2nd 1996

FOOTNOTES

[1]Plaintiff's statement to Claims Representative, August 30, 1994, Attachment to Cameron E. Hansen Affidavit, page 3.

[2] Id

[3]Kernan v. American Dredging Co., 355 U.S. 426, 431 (1958) . Great N. Ry. v. Donaldson, 246 U.S. 121 (1918); Louisville & Nashville R.R. v. Layton, 243 U.S. 617 (1917) . See also Frass v. Southern Pac. Transp. Co., 810 F.Supp 189, 190 (S.D. Miss. 1993) (citing O'Louqhlin v. National R.R. Passenger Corp., 928 F.2d 24 (1st Cir. 1991))

[4]The Federal Employer's Liability Act provides in relevant part that a railroad:

> [S]hall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.
>
> ***
>
> Any employee of a carrier, any part of whose duties as such employee shall, in any way directly or closely and substantially, affect [interstate or foreign] commerce . . . shall, for the purposes of this chapter, be consi.dered as being empLoyed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

15 U.S.C.A. § 51.

[5]Chicago, Burlington & Quincy R.R. v. Lane, 347 F.2d 332, 334 (10th Cir. 1965) (citing Rogers v. Missouri PaC. R.R., 352 UPS. 500, 506 (1957) ("[T]he test of liability under the FELA is whether the employer's negligence' played any part, even the slightest, in producing the injury or death for which damages are sought.'")) ; Fleming v. Kellett, 167 F.2d 265, 265 (10th Cir. 1948) (citing Ellis v. Union Pac. Ry.. 329 U.s. 649, 653 (1947) ("The basis of his [the employer's] liability is his negligence, not the fact that injuries occur * * *.")). See also Brady v. Southern Ry., 320 U.S. 476 (1943); Tiller v. Atlantic Coast Line Ry., 318 U.S. 54 (1943); Tennant v. Peoria & Pakiri Union Ry., 321 U.S. 29 (1944)); Rogers v. Chicago & N.W. Transp. Co., 947 F.2d 837 (7th Cir. 1991); Fowler v. Seaboard Coastline R.R., 638 F2d 17 (5th Cir. 1981); Brown v. CSX Transp., Inc., 18 F.3d 245, 249

[6] Moore v. Chesapeake & O. Ry., 649 F.2d 1004, 1007 (4th Cir. 1981) (citing Getty v. Boston & Maine Corp., 505 F.2d 1226 (1st Cir. 1974)). In Baltimore and Ohio R.R. v. Taylor, 589 N.E.2d 267, 273 (Inch App. 1992) the court said that FELA protects employees only if they are injured within the scope of employment.

[7]Atchison, 193 F.2d at 629, citing Erie R.R. Co. v. Winfield, 244 U.S. 170, (1917). See Bountiful Brick Co. v Cues, 276 tJ.S. 154, (1928); New York Cen. & Hudson River R.R. v. Carr, 238 U.S. 260 (1915) . See also Healv v. Pennsylvania R. Co., 184 F.2d 209 (3rd Cir. 1950); Thompson v. Eargle, 182 F.2d 717(4th Cir. 1950)

[8] This so-called "commuter rule" is clearly set forth in Williams v. Norfolk S. Ry. Co., bet al., 767 F.Supp. 756, 758 (ED. Va. 1991) (referring to Sassaman v. Pennsylvania R.R., 144 F.2d 950,955 (3rd. Cir. 1944)).

[9]Atchison, 193 F.2d at 629. In Atchison an employee bad

left the bunkhouse to procure bedding and groceries. The court held that the railroad was not liable under FELA for injuries sustained by an employee while commuting away from the workplace an hour after duty. The Tenth Circuit said: "When therefore, after his [plaintiff] day's work, he set out in his own bar to obtain groceries for himself, he was on a mission wholly unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in commerce within the meaning of the act." Atchison, 193 F.2d at 630. The Tenth Circuit cited with approval Quirk v. New York C. & St. L.R. Co., 189 F.2d 97 (7th Cir. 1951), cert. denied, 342 U.S. 871 (1951) in which a track foreman was held to be acting outside the scope of employment while driving employer's motorcar on employer's property because his shift had ended)) . See also Fowler v. Seaboard Coastline R.R., 638 F.2d 17 (5th Cir. 1981) (employee injured on motorcycle during lunch break was not within scope of employment); Rogers v. Chicago & N.W. Transp. Co., 947 F.2d 837 (7th Cir. 1991) (employee injured while jogging on railroad property during off-duty layover was not acting within scope of employment); Copeland v. St. Louis-San Francisco Ry., 291 F.2d 119 (Okl. Ct. App. 1961) (engaging in horseplay or prank is not within scope of employment); Hoyt v. Thompson, 174 F.2d 284 (Ill. Ct. App. 1949) (railway not liable for employee's injuries from wrestling and altercation)

[10] Streeter v. Erie R.R, 25 F.R.S. 272 (S.D.N.Y. 1960) (emplyee injured while traveling on employers train and doing paperwork required for his job); Carney v. Pittsburg & Lake Erie, R.R, 316 F.2nd 277 (3rd Cir. 1963 (Off duty lineman was injured while staying at the YMCA)

[11]In argument in a legal memorandum, counsel for plaintiff claims that plaintiff "discussed the situation [the lost checkbook] with his supervisor, Kurt Jenson" who was "the Road Foreman of Engineers for the Defendant, [and who]

authorized the plaintiff to go out into the yards where the locomotive was situated, to search for his checkbook." Plaintiff's Memorandum Brief in Opposition to Defendant's Motion for Summary Judgment and Removal, page 2.

[12] In another memorandum counsel states: "In our case, the plaintiff was subject to the order of his supervisor and in fact was responding to his supervisor's direction in searching the locomotive at the time he was injured. Plaintiff having obtained permission and authority of his Road Foreman of Engines, to search the locomotive, benefited both the employee and employer." Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand, page 2.

[13] Plaintiff testified that his supervisor was the "Foreman of Equipment" rather than in charge of "Engines":

Q: When did you discover your checkbook missing?
A: In the morning.
Q: Who is Kurt Jensen?
A: He's the Road Foreman of Equipment at Helper, Utah
Q: And Mr. Jensen said nobody had turned it in, so you
went back over to the Railroad to try to find it yourself?
A: Yes.
Q: Tony Bueno, you mentioned him, is he a carman?
A: He is a carman/machinist.
Q: Who is Gordon Olsen?
A: He is also a carman/machinist. That's a new term. That's what everybody calls these guys now because they can work a machine and carman.
Q: They were at the Helper Yard when

you arrived?

A: Yes sir.

Q: And you had conversation with them and they had not had an opportunity to look for anything like you might have lost?

A: Right.

Q: Mr. Bueno was the one that told you to go look on the engines?

A: Kurt Jenson is the one that told me to go over and look at them.

Excerpt from plaintiff's statement to Claims Representative, August 30, 1994, Attachment to Cameron E. Hansen Affidavit, pp. 4-5.

[14] The Tenth Circuit has made clear that the foremost factor in determining whether a plaintiff and defendant have an employer—employee relationship is if the "railroad has the power to direct, control and supervise appellee [employee] in the performance of his work at the time he was injured." Missouri— Kansas—Texas Ry. v. Hearson, 422 F.2d 1037, 1041 (10th Cir. 1970)

[15] Missouri—Kansas—Texas, at 1041.

No. 98-4154

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK H. FEICHKO, JR.,
Plaintiff-Appellant,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY;
THE SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,
Defendants-Appellees,

ORDER

Filed July 19 2000

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R.App.P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled ,th suggestion is also denied.